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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION SIX

THE PEOPLE,  
  
Plaintiff and Respondent,  
  
v.  
  
JOHN ANAYA ZUNIGA,  
  
Defendant and Appellant.

2d Crim. No. B153398  
(Super. Ct. No. 2001002804)  
(Ventura County)

Appellant John Anaya Zuniga was tried before a jury and convicted of assault with a firearm and possession of a firearm by a felon. (Pen. Code, §§ 245, subd. (a)(2), 12021, subd. (a)(1).) The jury determined that he personally used a firearm and inflicted great bodily injury during the commission of the assault, and had previously been convicted of two serious felonies. (Pen. Code, §§ 12022.5, subd. (a)(1), 12022.7, subd. (a), 667, subd. (a), 1170.12.) The trial court imposed a prison sentence of 50 years to life under the Three Strikes law, plus a determinate term of 12 years.

Appellant contends the judgment must be reversed because the trial court excluded relevant defense evidence and gave CALJIC No. 17.41.1, a standard instruction which infringed upon the jury's decision making process. We affirm.

FACTS

On January 20, 2001, appellant and Jose Amaro were drinking at the Casbah Bar in Oxnard. Shortly after midnight, appellant approached Amaro and shot

him in the neck with a handgun. The bullet traveled through Amaro's neck and lodged in his shoulder. Appellant immediately drove away but was stopped by law enforcement officers less than three miles from the Casbah. A loaded .380-caliber handgun was found under the seat of his car.

Amaro was taken to the hospital and the bullet was removed from his shoulder. He was interviewed by an Oxnard police officer, and identified the shooter as someone he knew from his neighborhood as "John Anaya." Amaro said that before shooting him, this John Anaya had questioned him about dancing with a woman at the bar and had made some reference to Amaro's family. The following day, police officers showed Amaro a photographic line-up containing a picture of appellant, but Amaro did not identify appellant as the shooter and said he did not know who shot him. At trial, Amaro maintained that he did not know appellant and did not remember who shot him.

Forensic testing revealed that the bullet removed from Amaro's shoulder had been fired from the .380-caliber handgun discovered that same night in appellant's car. Particles collected from appellant's hand after his arrest were identified as gunshot residue.

## DISCUSSION

### *Exclusion of Prior Threat Evidence*

Appellant contends the trial court erroneously excluded evidence of prior threats by third parties which tended to show that he acted in self-defense when he shot Amaro. We disagree.

A person claiming self-defense in a prosecution for assault must prove that he had an actual and reasonable belief that bodily injury was about to be inflicted upon him. (*People v. Minifie* (1996) 13 Cal.4th 1055, 1064.) Prior threats by the victim are relevant to assess a claim of self-defense, as are prior threats by third parties when the jury could infer that the defendant reasonably associated the victim with those threats. (*Id.* at pp. 1065-1069.)

At the close of the prosecution's evidence, defense counsel informed the court he intended to call Detective Glenn Velo of the Oxnard Police Department as a

witness. According to counsel, Velo would testify that he had previously received information from a reliable informant that the Mexican Mafia prison gang had placed a contract on appellant's life. Velo had advised appellant of those threats in August of 1999 and again in November of 2000. The defense theory was that when appellant saw Amaro at the Casbah on January 20, 2001, knowing that Amaro had served time in prison, he reasonably feared for his safety. In a hearing held outside the presence of the jury under Evidence Code section 402, Velo confirmed that he had learned of the threats from an informant and had conveyed these threats to appellant. He clarified that he had no information linking Amaro or his family to those threats, and that he had told appellant the people who were looking for him were from out of town.

The trial court excluded Detective Velo's proposed testimony as irrelevant and unduly confusing to the jury. (Evid. Code, §§ 210, 352.) This was not an abuse of discretion, given the utter lack of evidence linking Amaro to the threats against appellant's life. (See *People v. Minifie*, *supra*, 13 Cal.4th at p. 1070; *People v. Rowland* (1992) 4 Cal.4th 238, 264.) Contrary to the suggestion in the opening brief, Amaro's status as an "Hispanic who had been to prison" was not enough to support an inference that appellant reasonably believed him to be a member of the gang which issued the threats. To the contrary, Velo testified that he told appellant the people who were looking for him, unlike Amaro, were from outside the Oxnard area.

Moreover, a successful claim of self-defense requires a reasonable fear of *imminent* bodily injury. (*People v. Minifie*, *supra*, 13 Cal.4th at p. 1064-1065.) Third party threats may be considered when assessing the reasonableness of a defendant's response to a threat of imminent harm, but they do not give a defendant carte blanche to make a preemptive and potentially fatal strike against a person who might pose a risk sometime in the indefinite future. "Fear of future harm—no matter how great the fear and no matter how great the likelihood of the harm—will not suffice." (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082.)

There was no evidence that Amaro took any action on the night of the shooting that would have led appellant to fear bodily injury was imminent. The only

person who claimed to see any contact at all between the two men was a waitress from the Casbah who testified that they hugged each other in a friendly greeting sometime before the shooting. Appellant likens this scene to "two members of the Mafia hugging each other while they patted each other down," but does not explain how he could reasonably believe Amaro to be a threat after taking this precaution.

Appellant also contends the trial court required him to take the stand before it would allow additional evidence of self-defense as a defense to the assault charge. He argues this was improper because evidence of self-defense may be presented even if the defendant does not testify about his state of mind at the time of the assault. (See, e.g., *People v. DeLeon* (1992) 10 Cal.App.4th 815, 824 [state of mind defense such as imperfect self-defense may be presented without defendant's testimony].)

This argument misconstrues the nature of the trial court's ruling. The court did not condition the evidence of third party threats on appellant's testimony. Rather, it observed that *if* the defense presented some other evidence tending to show that appellant was responding to an imminent threat of injury when he shot Amaro, *then* the evidence of third party threats might be relevant to show he acted reasonably. The court noted that evidence of imminent injury could be presented through appellant's own testimony or that of a percipient witness, but that absent such evidence, the third party threats did not tend to prove or disprove any material issue in the case. (Evid. Code, § 210.)

Finally, we reject the claim that by excluding evidence of the third party threats, the court prevented appellant from presenting a defense and denied him due process. An application of the ordinary rules of evidence generally does not infringe on a defendant's right to present a defense. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103.)

#### *CALJIC NO. 17.41.1*

Appellant claims the trial court erred when it instructed the jury with CALJIC No. 17.41.1, which provides, "The integrity of a trial requires that jurors, at all times during their deliberations, conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention

to disregard the law or to decide the case based on penalty or punishment, or any other improper basis, it is the obligation of the other jurors to immediately advise the Court of the situation." He contends the instruction misstated the law by suggesting the jurors did not have the power to engage in nullification and return a verdict in his favor notwithstanding the evidence. Appellant also argues that the instruction intruded on the jury's decision making process and denied him his constitutional rights to juror unanimity and a fair trial. We disagree.

As a practical matter, the jury has the bare power to engage in nullification. (*People v. Williams* (2001) 25 Cal.4th 441, 453-456; *People v. Cline* (1998) 60 Cal.App.4th 1327, 1335.) But it has no right to do so and a defendant is not entitled to an instruction on the jury's power to disregard the law. (*People v. Elam* (2001) 91 Cal.App.4th 298, 312; see also *People v. Baca* (1996) 48 Cal.App.4th 1703, 1707.) CALJIC No. 17.41.1 did not abridge any cognizable "right" to juror nullification.

Appellant's remaining challenges to CALJIC No. 17.41.1 were recently rejected by our Supreme Court in *People v. Engelman* (2002) 28 Cal.4th 436. Although concluding the instruction was "unnecessary and inadvisable" (*id.* at p. 449), the court held that it did not abridge the defendant's right to a fair trial or juror unanimity and did not require reversal. Similarly, there is no suggestion in this record that appellant's jury applied CALJIC No. 17.41.1 in an unconstitutional manner.

The judgment is affirmed.

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COFFEE, J.

We concur:

GILBERT, P.J.

YEGAN, J.

Roland N. Purnell, Judge  
Superior Court County of Ventura

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